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No. 258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, H. A. Lott, Lee Blocker and Lorn D. Frazier, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case (No. 17,888 below).

CITATION TO OPINION BELOW

The majority opinion of the Court of Appeals (R. 696-709), printed in Appendix B hereto, *infra*, p. 29, is reported at ..... F. 2d ..... The dissenting circuit judge below has not yet filed an opinion. The District Court did not render an opinion.[1]

[1] For convenience, the conflicting Tenth Circuit opinion in *Lujan v. United States*, relied upon as a basis for certiorari, is printed in Appendix C hereto, *infra*, p. 49.

JURISDICTION

The judgment of the court below (Cameron, C. J., dissenting), dismissing the appeals for want of jurisdiction, was dated and entered June 20, 1960 (R. 710; *infra*, p. 41). No petition for rehearing was filed with the Court of Appeals. Jurisdiction of this Court is invoked under 62 Stat. 928, 28 U.S.C. §1254 (1), and Supreme Court Rule 22(2).

QUESTIONS PRESENTED

The *primary question* forming the basis for this petition for certiorari is:

1. Whether a notice of appeal in a criminal case was timely filed under Rule 37(a)(2), Federal Rules of Criminal Procedure,[2] where:

   (a) The notice of appeal was filed within 10 days after entry of the order denying a motion in arrest of judgment.

   (b) The motion in arrest of judgment was filed within 5 days after entry of the judgment.

   (c) A plea of *nolo contendere* was accepted more than 5 days before the motion in arrest of judgment was filed.

The following additional questions presented go to the merits of the appeals — they were not passed upon by the Court of Appeals since it dismissed the appeals for want of jurisdiction:

2. Whether a short-form indictment purporting to charge *individuals* with attempting to evade *corporate* income taxes, and conspiracy to do so, is sufficient where:

---

[2] All references to Rules are to the Federal Rules of Criminal Procedure, unless otherwise stated.

(a) The indictment does not charge that there was a deficiency in the payment of income taxes by the corporation.

(b) The indictment does not charge that the accused had knowledge of any tax deficiency.

(c) The indictment does not charge that the accused filed the corporate tax returns.

(d) The indictment does not charge what part the accused individually had in the alleged attempt to evade corporate income taxes.

(e) The conspiracy count of the indictment does not charge all of the basic elements of the substantive offense of attempted evasion of corporate income taxes which is alleged to have been the object of the conspiracy.

3. Whether the District Court lost jurisdiction to convict Petitioners upon their pleas of *nolo contendere* and impose prison sentences where:

(a) After acceptance of the pleas of *nolo contendere* the District Court deferred sentencing and proceeded to hear a lengthy trial of other persons who were accused in the indictment.

(b) On the day of the sentencing of Petitioners the District Court obviously relied upon the testimony adduced at the trial of the other persons accused in the indictment.

4. Whether imposition of prison sentences for *felony offenses* (in excess of one year) was beyond the jurisdiction of the District Court where the written judgments adjudged that Petitioners were convicted of the *misdemeanor offenses* of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns."

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The provision *primarily relied upon* as the basis for requesting issuance of a writ of certiorari is Rule 37(a)(2), Federal Rules of Criminal Procedure, which provides in pertinent part as follows:

> "(2) **Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion . . . ."

Other provisions involved are U. S. Const. amends. V, VI; Int. Rev. Code of 1939, ch. 1, §§145(a), 145(b), 53 Stat. 62, as amended, 57 Stat. 144; Int. Rev. Code of 1954, ch. 75, §§7201, 7203, 7207, 68A Stat. 851, 853; Conspiracy Act, 62 Stat. 701, 18 U.S.C. §371; Act of June 25, 1948, 62 Stat. 967, as amended, 63 Stat. 105, 28 U.S.C. §2255; Fed. R. Crim. P. 2, 7(c), 11, 12(b)(2), 32, 34, 37(a)(2), 45(b). The foregoing constitutional provisions, statutes and rules are printed in Appendix A, *infra*, p. 19.

STATEMENT

The three Petitioners were convicted, fined and sentenced to imprisonment by the United States District Court for the Southern District of Texas, Houston Division, on the basis of a Federal grand jury indictment (R. 11-23) which purports to charge them, along with Richard A. Farnsworth, Sr., and Alan Farnsworth, in five counts. Counts 1 through 4 purport to charge a willful attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc. (a Texas corporation) for the years 1951 through 1954, in

violation of Section 145(b) of the Internal Revenue Code of 1939 (counts 1-3), and Section 7201 of the Internal Revenue Code of 1954 (count 4). Count 5 purports to charge a conspiracy to willfully attempt to evade and defeat taxes of Farnsworth & Chambers Company, Inc., for the same years, in violation of 18 U.S.C. §371. Petitioners were employee-officers and minor stockholders (approximately 7% among them) of the corporation (R. 111, 533).

Following return of the indictment, Petitioners were arraigned and pleaded "not guilty" (R. 24). They filed motions to dismiss the indictment (R. 62), for severance (R. 47), and for a bill of particulars (R. 24, 82), but these were denied (R. 347). Petitioners then asked to be rearraigned for the purpose of entering pleas of *nolo contendere* (R. 444, 466). Acceptance of the pleas was vigorously opposed by the Government (R. 444-446, 466), but they were accepted by the District Court. The pleas of *nolo contendere* were entered on March 17, 1959, by Petitioners Blocker and Frazier (R. 464), and on March 20, 1959, by Petitioner Lott (R. 483).

After accepting such pleas, the District Court deferred sentencing and presided at the trial of Richard A. Farnsworth, Sr., and Alan Farnsworth under the indictment. This jury trial commenced early in April, 1959, and lasted through 11 weeks. Alan Farnsworth was found not guilty on all counts, but the jury failed to reach a verdict as to Richard A. Farnsworth, Sr.

Following the frustrating efforts of the Government in the Farnsworth trial (which ended June 9, 1959), Petitioners were called before the District Court on June 19, 1959, for sentencing (R. 487). During the sentencing proceedings repeated reference was made to evidence adduced at the Farnsworth trial (R. 488, 525, 532, 550). Petitioners were orally sentenced to serve terms of imprisonment, 3 years in the case of Blocker and 2 years each in the cases of Lott and Frazier, and each of the three was fined

$20,000 (R. 551-552). The written judgments were filed on June 22, 1959; they adjudge Petitioners guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns," although they refer to the statutes set out in the indictment (R. 553-559; *infra*, pp. 43-48).

On June 23, 1959, Petitioners Blocker and Frazier filed a motion denominated "motion in arrest of judgment," which prayed "that the judgment and sentences of movants be arrested and set aside and that the indictment against them be dismissed, and that movants be granted such other relief as may be required to serve the ends of justice" (R. 563-566). On the same day Petitioner Lott filed a "motion in arrest of judgment" praying for identical relief (R. 559-561). Orders denying the motions in arrest of judgment were entered on July 13, 1959 (R. 568, 569). Petitioner Lott filed notice of appeal to the Court of Appeals on July 15, 1959 (R. 572). Petitioners Blocker and Frazier filed notice of appeal on July 17, 1959 (R. 613). The Court of Appeals, one circuit judge dissenting, entered judgment dismissing the appeals for want of jurisdiction on June 20, 1960 (R. 710; *infra*, p. 41).

Since various dates are of critical importance in considering the decision of the Court of Appeals, they are set out below in chronological order:

March 17, 1959	Rearraignment and entry of *nolo contendere* pleas by Petitioners Blocker and Frazier (R. 464).
March 20, 1959	Rearraignment and entry of *nolo contendere* plea by Petitioner Lott (R. 483).
June 19, 1959	Sentencing of all Petitioners in open court (R. 487-553).
June 22, 1959	Judgment and commitment as to each Petitioner filed (R. 553-559).

June 23, 1959	Motions in arrest of judgment filed by all Petitioners (R. 559, 563).
July 13, 1959	Orders denying the motions in arrest of judgment of all Petitioners entered (R. 568, 569).
July 15, 1959	Notice of appeal filed by Petitioner Lott (R. 572).
July 17, 1959	Notice of appeal filed by Petitioners Blocker and Frazier (R. 613).

A divided Court of Appeals bench below dismissed the appeals upon the ground that its jurisdiction had not been invoked by timely notices of appeal (R. 696; *infra*, p. 29). The majority (composed of one of the circuit judges and the district judge on the bench hearing the case) held that the motions in arrest of judgment — *filed well within 5 days after entry of the judgments* —were not effective to toll the time for giving notice of appeal under Rule 37(a)(2) because such motions in arrest of judgment were not filed within 5 days *after entry of the nolo contendere pleas.* Acceptance of the *nolo contendere* pleas was construed to be a "determination of guilt" within the meaning of Rule 34.

REASONS FOR GRANTING THE WRIT

There are several compelling reasons why a review on writ of certiorari should be granted in this case:

1. The majority decision of the divided Court of Appeals in this case is in *direct and irreconcilable conflict* with decisions of the Court of Appeals for the Tenth Circuit.

2. The conflict concerns an extremely important question of federal criminal procedure and jurisdiction which should be settled by this Court.

3. The decision of the Court of Appeals in this case constitutes a strained interpretation of the Federal Rules

of Criminal Procedure which leads to illogical results — making Rule 37(a)(2) a virtual trap — and is believed to be erroneous.

4. Review on writ of certiorari is necessary in order that Petitioners will not be deprived of a review on the merits of convictions under an insufficient indictment — which were obtained in proceedings which departed from the accepted and usual course of criminal proceedings.

1. Conflict

The decision of the majority of the Court of Appeals bench below is in *direct conflict* with two decisions of the Court of Appeals for the Tenth Circuit, the first of which is *Lujan* v. *United States*, 204 F. 2d 171 (10 Cir. 1953), *infra*, p. 49. Existence of the conflict was expressly noted in the majority opinion below (*infra*, p. 32):

> ". . . Support for the appellants' position is found in *Lujan* v. *United States*, 10th Cir. 1953, 204 F. 2d 171, where the proposition for which appellants contend is adopted and applied. In the Lujan case the motion was for a new trial under Rule 33 Fed. Rules Crim. Proc. 18 U.S.C.A. rather than a motion for arrest of judgment such as is before us. We do not think this difference would call for a distinction."
>
> ". . .
>
> "We are in agreement with the Third Circuit that the rule announced in the Lujan case is unsound and ought not to be followed. . . ."

The Third Circuit decision referred to is *United States* v. *Bertone*, 249 F. 2d 156 (3 Cir. 1957), which is also in irreconcilable conflict with the Tenth Circuit decision in *Lujan*.

In the recent decision of *Smith* v. *United States*, 273 F. 2d 462 (10 Cir. Nov. 7, 1959), the Tenth Circuit took note of the conflict, but expressly reaffirmed its position. Indicating the

necessity for settlement by this Court of the disputed jurisdictional question here involved, the Tenth Circuit stated, 273 F. 2d at 465:

> ". . . It appears to us that the provisions of Rule 37(a)(2) are clear and unambiguous and can be changed only by the rule-making authority. . . ."

Indeed, this Supreme Court may have already decided this point in accordance with the two decisions of the Tenth Circuit and contrary to the decision of the Court of Appeals for the Fifth Circuit below. A factual situation identical in all material respects to that in the instant case was presented in *Sullivan* v. *United States*, 212 F. 2d 125 (10 Cir. 1954), *aff'd* 348 U.S. 170 (1954). The defendant entered a plea of *nolo contendere* on April 8, 1953, was sentenced on May 26, 1953, and filed a motion in arrest of judgment on May 29, 1953; the motion in arrest of judgment was denied after June 23, 1953, and within 10 days thereafter the notice of appeal was filed. Both the Court of Appeals and this Court exercised jurisdiction over the appeal. As the Court of Appeals stated in its opinion in this case, *infra*, p. 31, "[L]ack of jurisdiction can be raised at any time and the court is under a duty to notice absence of jurisdiction even though it is not raised by a party." It seems unreasonable to assume that in *Sullivan* both the Court of Appeals and this Supreme Court failed to notice absence of jurisdiction, even though it was not raised by a party. It seems much more reasonable to assume that jurisdiction was found by these courts to exist in *Sullivan* — in accordance with the "plain words" of Rule 37(a)(2). Cf., *United States* v. *Robinson*, 361 U.S. 220, 229 (Jan. 11, 1960).

The decision of *Marion* v. *United States*, 171 F. 2d 185 (9 Cir. 1948), *cert. den.* 337 U.S. 944, referred to in the opinion

below (*infra*, p. 32) is inapposite because there the motion was not filed within 10 days after entry of the judgment.[3]

2. Importance

It would be difficult to exaggerate the importance of the unsettled questions of federal criminal procedure here presented for review by this Court.

Manifestly, ascertainment of the time for filing notice of appeal is *of critical importance* in a criminal case. Indeed, the question arises in *nearly every such case* in which there is a conviction. In simple fairness, a defendant should be required only to read the rule entitled "Time for Taking Appeal" — Rule 37(a)(2) — in order to determine the amount of time he has in which to file his notice of appeal. Just as importantly, he should be able to depend upon what the rule plainly says. It is especially important that the

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[3] Petitioners' alternative position is that the motions in arrest of judgment should be viewed as motions to vacate the sentences under 28 U.S.C. §2255 (since they raised the insufficiency of the indictment to confer jurisdiction and also prayed that the sentences be set aside), and that the appeals should be regarded as having been taken from the denial of such motions. Recognizing the precedent for such treatment laid down by *Marteney* v. *United States*, 216 F. 2d 760 (10 Cir. 1954) — and apparently conceding its propriety *arguendo* — the Court of Appeals below held that the notices of appeal could not be treated as appeals from the denial of Section 2255 motions because the notices of appeal purport to be only from the judgments and sentences (*infra*, p. 40). This part of the decision represents a *severe conflict in principle* with the Fifth Circuit's own recent decision in *O'Neal* v. *United States*, 272 F. 2d 412 (5 Cir. Nov. 10, 1959), in which an appeal bond was held to constitute sufficient notice of appeal, as well as with other decisions of similar import. E.g., *Black* v. *United States*, 269 F. 2d 38 (9 Cir. 1959), *cert. den.* 361 U. S. 938, *Tillman* v. *United States*, 268 F. 2d 422 (5 Cir. 1959), and *Blunt* v. *United States*, 244 F. 2d 355 (D.C. Cir. 1957) — applications for leave to appeal in forma pauperis; *Jordan* v. *United States*, 233 F. 2d 362 (D.C. Cir. 1956), *rev'd mem. other grounds* 352 U.S. 904 (1956) — petition for writ of mandamus.

time for filing notice of appeal be made certain when it is remembered that many other matters must be considered immediately following the judgment: E.g., motions for new trial, motions in arrest of judgment, motions for suspension or reduction of sentence, applications for bail — in addition to the practical, non-legal problems which must be solved by one who is convicted.

That the question is of such importance as to warrant review is clearly indicated by the recent opinion in *United States* v. *Robinson*, 361 U.S. 220 (Jan. 11, 1960), involving a different question under Rule 37(a)(2), in which this Court stated, p. 222:

> ". . . Because of the importance of the question to the proper and uniform administration of the Federal Rules of Criminal Procedure, we granted certiorari. . . ."

The merits of the appeal, which were not reached by the Court of Appeals, also raise vital questions of criminal procedure. One extremely important question concerns the validity of the indictment (R. 11) under which Petitioners were convicted. It appears that this Court has never directly passed upon the requisites of an indictment for criminal income tax evasion. The necessity that such requisites be definitely established, and the importance of the matter, is shown by the fact that criminal indictments (or informations) in tax cases of all types were returned against 8,770 defendants during the fiscal year ended June 30, 1959, of which 702 were income tax and miscellaneous cases. ANNUAL REPORT OF THE COMMISSIONER OF INTERNAL REVENUE FOR THE FISCAL YEAR ENDED JUNE 30, 1959, p. 21. In this case the District Court upheld an indictment which purported to charge *individual employees* with attempting to evade *taxes of a corporation*, and which was in skeleton form, falling far

short of informing the accused of the nature and cause of the accusation against them to any reasonable degree.

Another important question on the merits concerns the effect of acceptance of a plea of *nolo contendere*, and the procedure which should follow entry of such plea. It is the contention of Petitioners that the record shows that the District Court based the convictions and sentences upon evidence adduced at the Farnsworth trial — rather than upon the pleas of *nolo contendere* — and that the District Court erred in so doing. Indeed, the U. S. Attorney in his oral argument to the Court of Appeals in this case admitted that it would be impossible for the District Court to have overlooked such evidence when sentencing these Petitioners. There is considerable doubt concerning the application and effect of the plea of *nolo contendere* authorized by Rule 11 — which doubt should be resolved by this Court. Existence of the doubt, and the importance of the question, is shown by the recent statement of policy of the United States District Court for the Southern District of Texas—presumably as a result of this case—that pleas of *nolo contendere* by individuals in felony cases will no longer be accepted, as reported in The Houston Post, May 22, 1960, Sec. 1, p. 16, reproduced in Appendix D., *infra*, p. 53. Unless review is granted, such defendants in the Southern District of Texas will not hereafter have the opportunity to enter such a plea. That is an unwarranted restriction of judicial discretion which is not contemplated by Rule 11.

3. Error in Decision Below

On the main question, it appears that the Court of Appeals erred in two respects: (1) It erred in holding that a motion in arrest of judgment must be timely under Rule 34 in order to toll the time for appeal under Rule 37(a)(2); and (2) it erred in holding that the motion in arrest of judgment, filed in the instant case, was not timely under Rule 34.

The real question is: Does Rule 37(a)(2) mean what it plainly says? It explicitly states that the longer time for appeal applies "if *a motion* for a new trial or in arrest of judgment has been made within the 10-day period" *following entry of judgment*. Rule 37(a)(2) does not state that the motion must be timely under Rule 34, or have any other quality — it requires only "*a motion* . . . in arrest of judgment." (Emphasis supplied.) *Lujan* v. *United States*, 204 F. 2d 171 (10 Cir. 1953), *infra*, p. 49; *Smith* v. *United States*, 273 F. 2d 462 (10 Cir. 1959).

It is clear that the motions in arrest of judgment in the instant case were timely filed under Rule 37(a)(2), since they were filed well "within 10 days after entry of the judgment." Furthermore, even if the motions in arrest of judgment were required to be timely under Rule 34, it clearly appears that they were filed "within 5 days after determination of guilt" under that Rule. The holding of the Court of Appeals below that the "determination of guilt," within the meaning of Rule 34, occurred when the *nolo contendere* pleas were entered comports with neither the plain language of Rule 34 nor with a logical construction of the Federal Rules of Criminal Procedure as a whole, especially when viewed in the light of the events in this case.

"Determination," in legal parlance, means "The decision of a court of justice. It implies an ending or finality, the ending of a controversy or suit." BLACK, LAW DICTIONARY 536 (4th ed. 1951). It certainly seems illogical to regard entry of the plea as a *determination*, in view of the provision of Rule 32(d) that "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed." Under such construction a defendant would be put in the ridiculous position of having to move to arrest a judgment not yet in existence, when his plea of *nolo contendere* might later be withdrawn.

Under the decision below Petitioners would have been required to file their motions in arrest of judgment *nearly three months* before pronouncement of sentence or entry of the judgments. Of course, they would not have done so, even if they had known of the construction subsequently adopted by the Court of Appeals below. To require a defendant who is awaiting sentence after a plea of *nolo contendere* to move in arrest of judgment *within 5 days after entry of the plea,* is to deny him the right to so move. In view of the presentence investigation procedure prescribed by Rule 32(c), and as a matter of common experience, entry of the plea will practically always precede the sentencing by more than 5 days. The fair and logical construction of the rules would be that the "determination of guilt" does not occur until the judgment is entered — certainly this should be so for the purpose of determining the timeliness of appeals. The decision below reduces Rule 37(a)(2) to a virtual trap.

4. Errors of the District Court

Unless review is granted, illegal convictions and sentences will be allowed to stand. The convictions and sentences are illegal because: (1) They are based upon a fatally defective indictment; (2) the District Court erred in deferring the sentencing of Petitioners and basing their convictions and sentences upon evidence adduced at the Farnsworth trial; and (3) the prison sentences were beyond the jurisdiction of the District Court to the extent that they exceeded imprisonment for one year.

The indictment (R. 11) appears to be wholly insufficient in that neither the substantive counts nor the conspiracy count charge all of the *essential elements* of the crime of attempted tax evasion. It fails to charge that there was a tax deficiency, which — as recognized by this Court in *Lawn*

v. *United States*, 355 U.S. 339, 361 (1958) — is "[O]ne of the basic elements of the offense." *Small* v. *United States*, 255 F. 2d 604, 606 (1 Cir. 1958). It fails to charge that the accused had knowledge of any tax deficiency, which would be required under the decision of this Court in *Ingram* v. *United States*, 360 U.S. 672 (1959). It even fails to charge that the accused filed the corporate tax returns. For lack of a direct charge of the foregoing *essential ingredients* of the offense, the indictment fails to charge an offense against the United States and is fatally defective.

Furthermore, the indictment is so vague, indefinite and uncertain that it fails to inform Petitioners of the nature and cause of the accusation against them within the meaning of the Sixth Amendment to the Constitution of the United States — it merely follows the language of the statutes. The indictment purports to charge Petitioners with attempted evasion of income taxes imposed upon *a corporation* — not their *personal income taxes*. Under such circumstances, it certainly should state facts sufficient, as a practical matter, to apprise each Petitioner of the criminal acts attributed to him, with reasonable detail, so that each would know the charge against him, and could prepare his defenses thereto. The instant indictment utterly fails in these respects. While the short-form indictment could possibly be justified in a personal income tax evasion case, it is grossly inadequate and unfair in a corporate income tax evasion case involving employees of varying responsibilities. The practice of using such an inadequate indictment should be repudiated by this Court.

The District Court departed sharply from normal and customary procedure by deferring the sentencing of Petitioners until after it had presided at the lengthy Farnsworth trial. Normal procedure would have called for sentencing shortly after entry of the *nolo contendere* pleas.

Under the circumstances, it is submitted that the District Court violated the command of Rule 32(a) that "Sentence shall be imposed without unreasonable delay." Petitioners believe that the record leaves the inescapable inference that they were *convicted and sentenced* upon the basis of evidence adduced at the Farnsworth trial — rather than upon their *nolo contendere* pleas. Petitioners were neither present nor represented at the Farnsworth trial, were not parties to it, and the evidence against them was received without the benefit of cross-examination or rebuttal evidence on behalf of Petitioners. They were tried *in absentia* and were not confronted with the witnesses against them. U. S. CONST. amend. VI.

Petitioners submit that the proceedings by the District Court constituted an implied rejection of the pleas of *nolo contendere*, and that the District Court thereby lost jurisdiction to convict and punish them as it did. Direct authority for Petitioners' contention is found in *Tucker* v. *United States*, 196 Fed. 260, 268 (7 Cir. 1912), in which, under similar facts, the conviction was reversed.[4] Petitioners should at the very least be granted an opportunity to replead to the indictment.

Although the indictment (R. 11) purported to charge Petitioners with the felonies of willfully attempting to evade corporate taxes, and conspiring to do so, the judgments adjudge them guilty of "filing false and fraudulent corporate income tax returns" and "conspiring to file false and fraudulent corporate income tax returns" (R. 553-559; *infra*, pp. 43-48). The language first quoted describes the

[4] The holding of the *Tucker* case that sentence of imprisonment cannot be had under a plea of *nolo contendere* was overruled in *Hudson* v. *United States*, 272 U.S. 451 (1926); however, its holding that rejection of the plea may be inferred from the fact that evidence was received by the trial court remains intact.

misdemeanor offense proscribed by Sections 7203 and 7207, INT. REV. CODE OF 1954, and Section 145(a), Int. Rev. Code of 1939. These misdemeanor offenses apparently are lesser offenses included within the felony charges. Under 18 U.S.C. §371, conspiracy to commit a misdemeanor subjects the offender to no more than the maximum punishment provided for the misdemeanor. Therefore, it appears that the sentences were beyond the jurisdiction of the District Court to the extent that they exceed imprisonment for one year.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated July 15, 1960

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitution of the United States Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Internal Revenue Code of 1939

Sec. 145. Penalties.

(a) **Failure to file returns, submit information, or pay tax.** Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations

made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution. (53 Stat. 62, as amended, 57 Stat. 144.)

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution. (53 Stat. 62.)

* * *

Internal Revenue Code of 1954

Sec. 7201. Attempt to Evade or Defeat Tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the cost of prosecution. (68A Stat. 851.)

Sec. 7203. Willful Failure to File Return, Supply Information, or Pay Tax.

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution. (68A Stat. 851.)

Sec. 7207. Fraudulent Returns, Statements, or Other Documents.

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. (68A Stat. 853.)

United States Code

Sec. 371. Conspiracy to Commit Offense or to Defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not

more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (62 Stat. 701.)

Sec. 2255. Federal Custody; Remedies on Motion Attacking Sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or i ringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (62 Stat. 967, as amended, 63 Stat. 105.)

Federal Rules of Criminal Procedure

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 7. The Indictment and the Information.

(c) **Nature and Contents.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated

by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

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Rule 11. Pleas.

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections.

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(b) The Motion Raising Defenses and Objections.

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(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial.

The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

* * *

Rule 32. Sentence and Judgment.

(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteris-

tics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Rule 34. Arrest of Judgment.

The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

Rule 37. Taking Appeal; and Petition for Writ of Certiorari.

(a) Taking Appeal to a Court of Appeals.

(1) Notice of Appeal. An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name

and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the court of appeals. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

(2) **Time for Taking Appeal.** An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

* * *

Rule 45. Time.

* * *

(b) **Enlargement.** When an act is required or allowed to be done at or within a specified time, the court for cause

shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

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APPENDIX B

APPENDIX B

OPINIONS AND JUDGMENTS BELOW

Court of Appeals Opinion

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17888

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
Appellants,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

(June 20, 1960.)

Before CAMERON and JONES, Circuit Judges, and WRIGHT, District Judge.

JONES, Circuit Judge: The three appellants and two others were charged, in the first count of a five-count indictment, with attempting to evade and defeat income taxes of a named corporation for the year 1951. Three other counts charged the same offense for each of the years

1952, 1953 and 1954. A fifth count of the indictment charged a conspiracy to evade and defeat the corporation's income tax for the years 1951 to 1954, inclusive. The appellants, two of them on March 17, 1959, and the third on March 20, 1959, by leave of court, withdrew pleas of not guilty and tendered pleas of nolo contendere. These pleas were accepted by the court. Sentencing was deferred. During the period of deferment the judge, who had permitted the filing of and had accepted the nolo contendere pleas, presided over the trial of the two others who had been jointly indicted with the appellants. At this trial one of those tried was acquitted and the jury was unable to agree upon a verdict as to the other. Thereafter, on June 19, 1959, the court, with the same judge presiding, called the appellants before him for sentencing. The appellant Blocker was sentenced to three years imprisonment. The appellants Frazier and Lott were each sentenced to two years imprisonment. A fine of $20,000 was imposed upon each appellant. The sentences were pronounced from the bench on June 19, 1959, and the formal written judgments were filed on June 22, 1959. On the following day, June 23, 1959, motions in arrest of judgment were filed by each appellant. These motions were denied on July 13, 1959. The appellant Lott filed notice of appeal on July 15, 1959, and the appellants Blocker and Frazier filed notice of appeal on July 17, 1959.

Although stated in different language, the claims of error made by the appellant Lott and those of the appellants Blocker and Frazier are substantially the same. It is contended that the indictments are insufficient; that the court was without jurisdiction to impose sentences on the pleas of nolo contendere after hearing the evidence adduced at the trial of the others who were jointly indicted; and that the sentences were beyond the jurisdiction of the court. These questions going to the merits are not reached.

The United States has moved to dismiss the appeals on the ground that the notices of appeal were not filed within ten days after the entry of the judgments appealed from as required by Rule 37(a)(2), Fed. Rules Crim. Proc. 18 U.S.C.A.; and that the motions in arrest of judgment did not enlarge the time for giving notice of appeal because, although filed within ten days of the entry of the judgment, the motions were not filed within five days after the determination of guilt as required by Rule 34 Fed. Rules Crim. Proc. 18 U.S.C.A. The appellants suggest that because the Government has designated portions of the record to be brought up on appeal and has filed a brief on the merits its motion to dismiss ought not be entertained. But lack of jurisdiction can be raised at any time and the court is under a duty to notice absence of jurisdiction even though it is not raised by a party. Rule 12(b)(2) Fed. Rules Crim. Proc. 18 U.S.C.A.

The appellants are insistent that under Rule 37(a)(2)[1] an appeal may be taken within ten days after the entry of an order denying a motion in arrest of judgment if such motion was filed within ten days after judgment even though the motion in arrest of judgment was filed out of time and the notice of appeal was not filed until more than ten days had elapsed after judgment. This, the appellants say, is the clear, explicit and unambiguous meaning of Rule 37(a)(2) notwithstanding the provision of Rule 34[2] requir-

[1] An appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from, but if a motion for new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. Rule 37(a)(2) Fed. Rules Crim. Proc. 18 U.S.C.A.

[2] The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period. Rule 34, Fed. Rules Crim. Proc. 18 U.S.C.A.

ing the filing of a motion in arrest of judgment within five days after determination of guilt. Support for the appellants' position is found in *Lujan* v. *United States*, 10th Cir. 1953, 204 F. 2d 171, where the proposition for which appellants contend is adopted and applied. In the Lujan case the motion was for a new trial under Rule 33 Fed. Rules Crim. Proc. 18 U.S.C.A. rather than a motion for arrest of judgment such as is before us. We do not think this difference would call for a distinction.

The doctrine of Lujan was expressly rejected in *United States* v. *Bertone*, 3rd Cir. 1957, 249 F. 2d 156. There the defendant was convicted on March 28, 1957, sentenced in open court on April 12, 1957, and a judgment of sentence and commitment was entered on April 18, 1957. On April 22, 1957, the defendant filed motions for a new trial and in arrest of judgment. On August 9, 1957, an order was entered denying the motions. On August 19, 1957, the defendant gave notice of appeal from the judgment and sentence of April 18, 1957, and from the August 19, 1957, order. The motions were filed within ten days after the entry of the judgment as is the case here. The appeal was taken within ten days after the entry of the order denying the motions, as is the case here. The motions were not timely filed as was the case in Lujan, and as is the case here unless, of course, the entry of the pleas of nolo contendere did not result in determination of guilt within the meaning of Rule 34. In the Bertone case it was held that the appeal was not taken in time. The same conclusion, upon a similar factual situation, was reached in *Marion* v. *United States*, 9th Cir. 1948, 171 F. 2d 185, cert. den. 337 U.S. 944, 69 S. Ct. 1500, 93 L. Ed. 1747.

We are in agreement with the Third Circuit that the rule announced in the Lujan case is unsound and ought not to be followed. To hold, as Lujan holds, that the untimely filing

of a motion for a new trial or in arrest of judgment will toll the running of the time in which an appeal may be taken, although the motion could not be considered on its merits, produces a result which we think was not intended. It does not seem that the Supreme Court, in framing the rules, had the design of permitting a convicted defendant to file out of time a motion which the court could not have given him leave to file after the time for filing had expired,[3] and so obtain an extension of the time for taking an appeal even though the court itself was powerless to grant such an extension.

This Court has, heretofore considered the question and has adopted the rule announced in Bertone, citing that opinion with approval. This Court has succinctly stated the principle in this language:

> "To extend the time for taking an appeal, a motion for new trial must be both (a) timely made under Rule 33 and (b) made within ten days after entry of the judgment of conviction under Rule 37(a)(2)." *O'Neal* v. *United States*, 5th Cir. 1959, 264 F. 2d 809. Cf. *Massicot* v. *United States*, 5th Cir. 1958, 254 F. 2d 58.

If the pleas of nolo contendere and the acceptance of them were determinations of guilt it follows that the motions in arrest of judgment were filed too late, the time for appeal was not tolled, and the appeals were not taken in time. If, on the other hand there was no determination of guilt, as that phrase is used in Rule 34, until the judgment and sen-

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[3] When an act is required or allowed to be done at or within a specified time the court for cause shown may . . . order the period enlarged . . . or . . . permit the act to be done after the expiration of the specified period . . . but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal. Rule 45(b), Fed. Rules Crim. Proc. 18 U.S.C.A.

tence, then the motions were timely made and the appeals were timely taken.

After a jury trial a determination of guilt has been made when a verdict of guilty has been returned by the jury and accepted by the Court. *Brown* v. *United States*, 9th Cir. 1952, 198 F. 2d 999; *Finn* v. *United States*, 4th Cir. 1958, 256 F. 2d 304. A determination of guilt has been made when a plea of guilty has been entered. *Marteney* v. *United States*, 10th Cir. 1954, 216 F. 2d 760. The appellants urge that a plea of nolo contendere is a plea in avoidance without a confession and that it does not result in a determination of guilt. It is, so appellants say, only an implied confession of guilt, a mere statement of unwillingness to contest, and no more. The federal courts, however, have long held that the legal effect of a plea of nolo contendere is the same as a plea of guilty for all purposes so far as regards proceedings on the indictment. *United States* v. *Hartwell*, Cir. Ct. Mass. 1869, 3 Cliff. 221, 26 Fed. Cas. 196. A leading case is *United States* v. *Lair*, 8th Cir. 1912, 195 F. 47, where it is said:

> "In fact, the defendant admitted that he committed the offense charged within that district; for his plea of nolo contendere is in effect a plea of guilty to every essential element of the offense well pleaded in the charge against him, and warrants his conviction thereof without more." 195 F. 47, 52.

On the question of guilt or innocence, the Supreme Court has held that the plea of nolo contendere is as conclusive as a plea of guilty would have been, and after such a plea nothing is left but to render judgment. *United States* v. *Norris*, 281 U.S. 619, 50 S. Ct. 922, 74 L. Ed. 1076. See also *Hudson* v. *United States*, 272 U.S. 451, 47 S. Ct. 127, 71 L. Ed. 347; *United States* v. *Frankfort Distillers*, 324 U.S. 293, 65 S. Ct. 661, 89 L. Ed. 951. The well settled principle that

for the purposes of the case, the plea of nolo contendere is the equivalent of a plea of guilty has been recognized and applied by this Court. *Farnsworth* v. *Zerbst*, 5th Cir. 1938, 97 F. 2d 255. Cf. *Piassick* v. *United States*, 5th Cir. 1958, 253 F. 2d 658; *Mickler* v. *Fahs*, 5th Cir. 1957, 243 F. 2d 515. The state courts, generally, are in accord. Annot. 152 A.L.R. 253; 4 Wharton Criminal Law and Procedure, 772, § 1903; Lenvin and Myers, Nolo Contendere: Its Nature and Implications, 51 Yale Law J. 1255. The rule being as it is, it follows that the determination of guilt of the appellants was made when their pleas of nolo contendere were tendered to and accepted by the court.

However may be the law as to when, in the usual case, there is a determination of guilt for the measuring of the time for filing a Rule 34 motion, the appellants say that there was not, in fact, any determination of guilt at the time of the pleas. That determination, say the appellants, was not made until after the trial of the other defendants and the determination of guilt was made by the court, and was based upon the evidence heard by the court at the trial rather than upon the pleas of nolo contendere. Upon this theory the time within which the motions in arrest of judgment could be filed would begin at the time the sentences were imposed. In considering the contention of the appellants that they were sentenced upon a determination of guilt based upon the evidence at the trial of the other defendants rather than upon their pleas of nolo contendere, a look at the record becomes desirable. What happened is this; during the proceedings for sentencing the court heard statements of counsel for the appellants seeking mitigation of punishment. In these statements references were frequent to matters which transpired at the trial of the other defendants. It was brought out that counsel for the appellants had a representative at the trial, taking

notes, and reporting to counsel so that they knew, in the words of one of the attorneys "exactly what was testified, in substance." Two of the three appellants made statements on behalf of themselves. Character witnesses numbering five, seven, and five, for the respective appellants, testified. At the conclusion of the hearing the court stated, "I have found each guilty of the felonies as contained in the grand jury indictment." Then followed an oral pronouncement by the court of the sentences. This hearing was on June 19, 1959. On June 22, 1959, the court entered, as to each appellant, a formal judgment and commitment. From them we quote:

> "It is adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of . . . and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,
>
> "It is adjudged that the defendant is guilty as charged and convicted."

We need not consider whether the judgment was the oral pronouncement of sentence or the formal writing. Cf. *Pollard* v. *United States*, 352 U. S. 354, 77 S. Ct. 481, 1 L. Ed. 2d 393; *United States* v. *Hark*, 320 U. S. 531, 64 S. Ct. 359, 88 L. Ed. 290; *Patterson* v. *United States*, 5th Cir. 1950, 183 F. 2d 687; *Spriggs* v. *United States*, 9th Cir. 1955, 225 F. 2d 865. In neither the oral sentence nor the formal judgment does it appear that the determination of guilt is based upon the trial of the other defendants. Any such conclusion is negatived by recital in the formal judgment that "the defendant has been convicted upon his plea of nolo contendere." We see no merit in this contention of the appellants.

We can find no principle that would sustain the appellants in their contention that they have given and filed a notice of appeal from the judgments of conviction and sentence within the time prescribed by the applicable rule.

The appellants ask that we treat the notices of appeal as being from the order denying the motions in arrest of judgment in the event we hold that there were no timely notices given of appeals from the judgments of conviction and sentence. An order overruling a motion in arrest of judgment is, it seems, an appealable order. *Sutton* v. *United States*, 5th Cir. 1946, 157 F. 2d 661. The difficulty with the appellants' proposal is that, since the motion was not timely filed, the district court had no jurisdiction of the motion and all that this Court could do would be to direct that the order denying the motion be affirmed for want of jurisdiction. Such an ineffectual result need not be further considered.

It is contended by the appellants that if their appeal from the judgment was not taken in time, we should treat the motion in arrest of judgment as a motion to vacate the sentence under 28 U.S.C.A. § 2255, and then treat the notice of appeal as being directed to the court's order as denying Section 2255 relief. The Tenth Circuit, in a case where a motion in arrest of judgment was filed too late, treated the motion as one to vacate. In its opinion it was said:

> "The 'motions in arrest of judgment', having been filed more than five days after determination of guilt, were untimely under Rule 34 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., and the government takes the preliminary position that the trial court was without authority to treat the pleadings as motions to vacate under Section 2255 for the purpose of considering the legal questions raised by the motions. Section 2255 specifically authorizes 'A prisoner in

> custody under sentence of a court * * * claiming * * * that the court was without jurisdiction to impose such sentence * * * may move the court which imposed the sentence to vacate, set aside or correct the sentence * * * at any time.' Treated as motions to vacate, the pleadings were undoubtedly timely to challenge the legal sufficiency of the counts in the indictment to state a federal offense. Having in mind that it is the content of the pleadings and not the label which determines their nature and effect, we can see no impropriety in the court's treatment of the pleadings as motions to vacate under Section 2255." 216 F. 2d 760, 762.

The Fourth Circuit adopted the doctrine in *Finn* v. *United States*, 4th Cir. 1958, 256 F. 2d 304, and used it as a means for reaching the merits of the question presented by the motion and the ruling upon it.

The appellants are not presently in confinement and recognize that 2255 relief is not available to anyone who is not in custody under sentence of a court. *Heflin* v. *United States*, 358 U. S. 415, 79 S. Ct. 451, 3 L. Ed. 2d 407. They would have us surmount this barrier by following the pronouncement of the Ninth Circuit in *Black* v. *United States*, 9th Cir. 1959, 269 F. 2d 38, cert. den. 361 U. S. 938, 80 S. Ct. 209, 4 L. Ed. 2d 357. Black had attempted to take an appeal and, under Rule 38(a)(2), had elected not to begin serving his sentence. The appeal was filed out of time. He later filed a Section 2255 motion and attempted, though not in custody, to appeal from an order denying relief. It was held that since the 2255 motion cannot be maintained while there is a pending appeal in good standing, the appeal was deemed abandoned by the filing of the 2255 motion. Since Black would be entitled to freedom from custody only if he had an appeal pending from his conviction and sentence, he was regarded as being in technical custody after the

filing of his 2255 motion for the purpose of conferring 2255 jurisdiction. In this case, the appellants assert, they should be regarded as being in technical custody for the purpose of allowing jurisdiction over their Rule 34 motions which they would have us treat as being made under Section 2255. It might be observed that, when the Rule 34 motions were filed, the time for appeal had not run and the appellants could not claim that they were then in technical, any more than actual, custody.

We have mapped but a part of the tortuous road over which the appellants would lead us in seeking to sustain our jurisdiction to review this case. In going with them as far as the foregoing outline would take us, it would be necessary to hold that the Rule 34 motions were not Rule 34 motions at all but, in effect, Section 2255 motions; and that the appellants, although not in custody in any real sense,[4] are in technical custody so as to permit the court to entertain the mislabeled 2255 motion. But could we travel with appellants thus far we would then become confronted with the question as to whether we may treat the notices of appeal as being from the order denying the Rule 34 motions treated as Section 2255 motions. The notices of appeal purport to be only from the judgments and sentences. We do not have in the notices of appeal an inclusion of the orders on the motions as was the case in *Marteney v. United States, supra*. Although it is provided that a court shall not be required to entertain a second or successive motion under Section 2255, it may, in its discretion, do so. *Wells v. United States*, 5th Cir. 1954, 219 F. 2d 112.

To remove any question as to whether a 2255 motion might be filed and to avoid circuity of actions in resolving

[4] The notices of appeal state that the appellants are at liberty on bail.

the questions, it might be well to review, to the extent permissible, the questions which the appellants assign as error. In the case of *Heflin* v. *United States*, *supra*, the Supreme Court treated a motion under Section 2255 as a motion under Rule 35, Fed. Rules Crim. Proc. 18 U.S.C.A., and held that although there was no timely application for certiorari to review an order on a Rule 35 motion, the Supreme Court would, in order to avoid a circuity of actions, dispense with the requirements of its Rule 22(2). But we are not authorized to dispense with the rules that govern our jurisdiction. On the contrary, we are expressly prohibited from extending the time for taking appeals. Rule 45(b), Fed. Rules Crim. Proc. 18 U.S.C.A. So also the Rules require that the notice of appeal shall set forth, among other things, "a concise statement of the judgment or order, giving its date, and any sentence imposed." Rule 37(a)(1), Fed. Rules Crim Proc. 18 U.S.C.A. We cannot treat an express reference in the notice of appeal to a judgment and sentence of a specified date as evidencing an appeal from an order upon a motion subsequently filed, no matter how the motion may be treated. Cf. *Martin* v. *United States*, 10th Cir. 1959, 263 F. 2d 516; *Jacobanis* v. *United States*, 1st Cir. 1958, 256 F. 2d 485.

We reach, finally, the conclusion that the jurisdiction of this Court has not been invoked by timely notices of appeal. So concluding we dismiss the appeals without consideration of the other questions which the appellants have asked us to decide. It would not be appropriate to suggest whether, and if so how, those questions may be hereafter raised.

The appeals are

DISMISSED.

CAMERON, Circuit Judge, Dissenting.

Court of Appeals Judgment

JUDGMENT.

Extract from the Minutes of June 20, 1960

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,

No. 17888. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and on the motion filed by appellee on February 26, 1960 to dismiss the appeals, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeals in this cause be, and the same are hereby, dismissed.

"Cameron, Circuit Judge, Dissenting."

Judgment and Commitment — H. A. Lott

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr. 13298.

H. A. Lott

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U.S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26, U. S. Code Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2)

Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of two years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A. M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge.

The Court recommends commitment to: Seagoville, Texas.

Approved: F.L.H.

Judgment and Commitment — Lee Blocker

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr. 13298.

Lee Blocker.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26, U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Three (3) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of three years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge.

The Court recommends commitment to: Seagoville, Texas.

Approved: F L.H.

Judgment and Commitment — Lorn D. Frazier

Filed Jun. 22, 1959.

United States District Court for the Southern District of Texas, Houston Division.

United States of America,

v. No. Cr. 13298.

Lorn D. Frazier.

On the 19th day of June, 1959 came the attorney for the government and the defendant appeared in person and with counsel.

It Is Adjudged that the defendant has been convicted upon his plea of nolo contendere of the offense of filing false and fraudulent corporate income tax returns, in violation of Title 26, U. S. Code, Section 145(b), as charged in Counts 1, 2 and 3, and in violation of Title 26 U. S. Code, Section 7201, as charged in Count 4; and the offense of conspiring to file false and fraudulent corporate income tax returns, in violation of Title 18, U. S. Code, Section 371, as charged in Count 5; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years on each of Counts 1, 2, 3, 4 and 5, to run concurrently, making a total of two years.

It Is Further Adjudged that the defendant is hereby fined the sums of Two Thousand Five Hundred ($2,500.00) Dollars on Count 1, Two Thousand Five Hundred ($2,500.00) Dollars on Count 2, Five Thousand ($5,000.00) Dollars on Count 3, Five Thousand ($5,000.00) Dollars on Count 4, and Five Thousand ($5,000.00) Dollars on Count 5, to run consecutively, making a total of $20,000.00.

It Is Adjudged that the United States of America shall recover from the defendant the sum of $20,000.00, named above, for which execution may issue. In default of payment of said fine, the defendant is to be further committed until the fine is paid or until he shall be otherwise lawfully discharged.

It Is Ordered that the defendant is to report to the United States Marshal at 10:00 A.M., on July 20, 1959, to begin service of this sentence.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Done the 22nd day of June, 1959.

ALLEN B. HANNAY,
United States District Judge

The Court recommends commitment to: Seagoville, Texas.

Approved: F.L.H.

APPENDIX C

Conflicting Tenth Circuit Opinion

LUJAN v. UNITED STATES

No. 4663.

United States Court of Appeals,
Tenth Circuit.

May 5, 1953.
(204 F. 2d 171)

Before BRATTON, MURRAH and PICKETT, Circuit udges.

BRATTON, Circuit Judge.

This is a criminal case and it is pending on motion of ie government to dismiss the appeal. The ground of the otion is that the notice of appeal was filed out of time nd that therefore the court is without jurisdiction to enter- ain the appeal.

On January 16, 1952, the verdict was returned finding ppellant guilty. On January 23, sentence was imposed and rmal judgment entered. On the same day, the court en- red an order purporting to grant appellant leave to file ithin ten days thereafter a motion for judgment of ac- uittal notwithstanding the verdict and a motion for new ial. On January 30, both motions were filed. On February , both motions were denied. On February 12, a formal der was entered denying the motion for new trial. And February 16, the notice of appeal was filed.

It is well settled that the filing of a notice of appeal ithin the time fixed by the Rules of Criminal Procedure, U. S. C., is jurisdictional, and that the filing of the notice t of time does not confer jurisdiction upon the appellate urt. United States v. Bloom, 2 Cir., 164 F. 2d 556, cer-

tiorari denied 333 U. S. 857, 68 S. Ct. 726, 92 L. Ed. 1137; United States v. Froehlich, 2 Cir., 166 F. 2d 84; Swihart v. United States, 10 Cir., 169 F. 2d 808.

Rule of Criminal Procedure 33 provides in presently pertinent part that a motion for new trial based upon any ground other than newly discovered evidence shall be made within five days after verdict or finding of guilty or within such further time as the court may fix during the five-day period. The motion for new trial in this case was not based upon newly discovered evidence. It was predicated upon other grounds and it was not filed within five days after the finding of guilty. The court entered an order purporting to enlarge the time for the filing of the motion but the order was entered more than five days after the finding of guilty. And after the expiration of the five-day period following the finding of guilty, the court was without jurisdiction to enter the order enlarging the time for the filing of the motion for new trial. Since the motion was not filed within five days after the finding of guilty, and since no order was entered during such five-day period enlarging the time, the motion was filed out of time within the purview of Rule 33. Pugh v. United States, 9 Cir., 197 F. 2d 509. But this rule concerns itself solely and exclusively with the time within which a motion for new trial may be filed. It does not undertake to fix the time within which the notice of appeal shall be filed. It does not pretend to exert any impact upon the time for the filing of the notice of appeal. It does not project itself into that field in any manner or to any extent.

Rule of Criminal Procedure 37 — not 33 — relates to the time and manner for the taking of an appeal. It provides among other things that an appeal authorized by law from a district court to a court of appeals is taken by

filing with the clerk of the district court a notice of appeal in duplicate, and that an appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from, but if a motion for new trial has been made within the ten-day period, an appeal from the judgment of conviction may be taken within ten days after entry of the order denying the motion. The motion for new trial in this case was filed less than ten days after the imposition of sentence and entry of the judgment. While not filed within five days after the finding of guilty, and while no order was entered during such five-day period enlarging the time for the filing of the motion, it was filed within ten days after entry of the judgment. Significantly, Rule 37 does not provide that if a motion for new trial is filed within five days after return of verdict or finding of guilty, or within such further time as the court may fix during such five-day period, the notice of appeal shall be filed within ten days after entry of the order denying the motion. It does not speak in express terms of a motion for new trial filed within such five-day period, or within such enlarged period. It makes no express reference to a motion filed within either of such periods. And it fails to contain any language indicating even by clear implication that it is limited to a motion seasonably filed under Rule 33. The sweep of the rule is to provide without condition or qualification that an appeal by a defendant may be taken within ten days after entry of judgment or order appealed from, and further that if a motion for new trial has been made within the ten-day period then an appeal from the judgment may be taken within ten days after entry of the order denying the motion. The motion for new trial having been filed within ten days after entry of the judgment, and the notice of appeal having been filed within ten days after entry of the order denying the motion, the motion to dismiss the appeal is not well taken and is denied.

APPEND

APPENDIX D

Newspaper Article

PAGE 16, SECTION 1 THE HOUSTON POST
SUNDAY, MAY 22, 1960

Area U.S. Judges Rule Out Pleas of 'Nolo Contendere'

Federal judges in the Southern District of Texas will no longer accept pleas of nolo contendere from individuals charged with felony offenses, U. S. District Judge Allen B. Hannay confirmed Saturday.

The new policy came to light when Johnny B. Watkins, through his attorney, Gabriel M. Nahas, attempted to enter the plea to charges of making a false statement in a job application to the Post Office here.

FEDERAL JUDGE Joe Ingraham refused to accept the plea, saying that the district judges had agreed to take nolo contendere pleas only in some cases involving corporations and misdemeanors.

Nahas then entered a plea of innocent for his client.

In the past a number of persons charged with felonies have entered the plea, which means that they will accept the judgment of the court without admitting guilt or innocence.

Most of the judges have privately considered a nolo contendere plea an out for defendants who do not want to stand in court and say that they have been guilty of a crime.

THE PLEA IS particularly important to corporations which have been charged with civil as well as criminal actions in the same case, such as tax frauds.

A guilty plea in the criminal tax action, which is always tried first, can be used against the defendant later in a civil trial.

Whether or not a nolo contendere plea will be accepted is left to the discretion of the judges in a particular federal district.